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Supreme Court of the United States

October Term, 1947

No. 350

WILLIAM DUDLEY PELLEY,
Petitioner,

v.

W. BRUCE MATTHEWS, UNITED STATES MARSHAL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

AND

BRIEF IN SUPPORT OF PETITION

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William Dudley Pelley, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia (R. 12), affirming the judgment of the United States District Court for the District of Columbia, dismissing his petition for writ of habeas corpus filed in the latter court.

OPINIONS BELOW

The District Court rendered and spread upon the record in that Court a formal Judgment which appears in full at R. 10a.

The opinion of the Court below appears in full at R. 12.

JURISDICTION

This cause was argued in the Court below on May 28, 1947. The opinion and judgment of the United States Court of Appeals for the District of Columbia were entered June 30, 1947. (R. 12). The jurisdiction of this Court is invoked under Title 28, Section 347, United States Code.

SUMMARY STATEMENT OF THE FACTS AND OF THE MATTER INVOLVED

The petitioner was convicted in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, on August 12, 1942, of violation of Title 50, Sections 33 and 34, United States Code, and sentenced to a term of 15 years' imprisonment.

Thereafter the Circuit Court of Appeals for the Fifth Circuit affirmed the action of the trial Court as aforementioned, in 132 F. 2d 170.

Thereafter this Court declined to grant petition for Writ of Certiorari 87 L. Ed. 1135, 318 U. S. 764, 63 S. Ct. 665.

The petitioner was incarcerated in the Federal Penitentiary, at Terre Haute, Indiana, to serve his sentence.

However on November 28, 1942, by writ of habeas corpus ad prosequendum, petitioner was removed from the prison

at Terre Haute, to the Washington Asylum and Jail, Washington, D. C., to undergo trial as a defendant in the "Mass Sedition" case then pending in that Court.

On November 29, 1944, the current—as of that moment—trial of the latter cause terminated due to the unfortunate demise of the late Chief Justice Eicher, who had been presiding for many months.

That situation however did not end the cause. The government kept it alive—sent investigators to Europe seeking new evidence to make a case—and continuously sought and obtained new and progressive continuances.

However in November 1946, Chief Justice Laws, dismissed the cause for lack of prosecution.

The government appealed from the ruling of Chief Justice Laws, and on June 30, 1947, the United States District Court of Appeals affirmed the judgment of Chief Justice Laws.

The government did not prosecute the matter to the Supreme Court of the United States.

During all of this time—November 1942, to June 1947, your petitioner was confined in the Washington Asylum and Jail.

On January 7, 1947, petitioner filed with the District Court for the Southern District of Indiana, petition for writ of habeas corpus, attacking his conviction in that Court.

That petition was by that Court denied for the reason that the petitioner being within the District of Columbia, was not within the jurisdiction of that Court. See R. 10a.

Thereupon on January 13, 1947, petitioner filed with the District Court of the United States for the District of Columbia, the petition for writ of habeas corpus, which is the subject matter of this action. R. 2a-8a.

Thereupon a rule to show cause issued, directed to the United States District Attorney, District of Columbia. See R. 8a.

Thereupon the government made answer to the rule to show cause and to the petition for writ of habeas corpus. See R. 8a-9a.

Thereupon the Court made its judgment of February 10, 1947, dismissing the petition for the reason the Court was without jurisdiction. See R. 10a.

QUESTIONS PRESENTED

The Court below, speaking unanimously, as a three Justice bench held:

> "In view of this court's decision in *Downey* v. *U. S.* and *Noble* v. *Botkin* the trial court was correct in dismissing the petition. The effect of these decisions is that the District Court has no jurisdiction to entertain a petition for a writ of habeas corpus attacking the petitioner's original conviction when the petitioner is held in this jurisdiction solely by reason of a writ of habeas corpus ad prosequendum. We see no reason to depart from this rule."

I

Upon what legal authority did the Court below conclude that this petitioner, at the time of filing his petition for writ of habeas corpus in the District of Columbia, was being held in the District of Columbia, solely by reason of a writ of habeas corpus ad prosequendum?

In its opinion in this cause, see R. 12, the Court below stated in footnote 1 thereof, that the "*Mass Sedition*" case, which gave rise to the writ of habeas corpus ad prosequendum relied upon by the Court below, had been dismissed by the trial court. Therefore the Court below judicially and factually knew that the proceedings which

had supported the writ of habeas corpus ad prosequendum had been dismissed as to petitioner and that the process issued incident to it had come to a legal termination and was no longer legally extant.

Further, the Court below judically and factually knew, from the record before it in the "*Mass Sedition*" appeal, that in the "*Mass Sedition*" case, in the trial court, the minute entry of December 2, 1946, contained, amongst other matters, the following notation:

> "* * * it is this 2nd day of December, 1946, ordered, That the said case be, and the same is, hereby dismissed.
>
> "and thereupon it is considered by the Court that the defendants, William Dudley Pelley, * * * be released from further custody in this case * * *."

II

What is the legal force and effect of the writ habeas corpus ad prosequendum?

Is it the same as for the great writ habeas corpus ad subjiciendum?

Or it the writ habeas corpus ad prosequendum merely process?

III

What is the legal source of authority through the medium of which the Court below declined to assume jurisdiction of the petition for writ of habeas corpus, in the instant cause, which can or may supersede the provisions of Article I, Section 9, Clause 2 of the Constitution of the United States, which provides as follows:

> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

IV

Under what legal authority does the Court below, through judicial legislation decline jurisdiction of a writ of habeas corpus, as was done here in view of Title 28, Section 451, United States Code, which provides as follows:

> "Section 451. Power of Courts. The Supreme Court and the district courts shall have power to issue writs of habeas corpus;"

and in view of Title 28, Section 452, United States Code, which provides as follows:

> "Section 452. Power of Judges; * * *.
>
> "The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. * * *."

REASONS FOR ALLOWANCE OF THE WRIT

1. The Court below has decided an important question of Federal Law which has not been, but should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia has decided a question of general importance and substance relating to the construction and application of the Constitution, and to Title 28, Sections 451, 452, which have not been, but should be settled by this Court.

3. The Court below has decided a federal question in a way and manner in conflict with applicable decisions of this Court.

4. The Court below has decided an important question of Federal Law in direct conflict with an applicable opinion of another Circuit. See, *King* v. *McLean Asylum of the*

Massachusetts General Hospital, 64 Fed. 331, 341, 342, 343, 344, 345, 346, 347.

CONCLUSION

The opinion of the Court below amounts to a substantial, effective and real suspension of the privilege of the writ of habeas corpus as provided for in Article I, Section 9, Clause 2, of the Federal Constitution, and of the statutes enacted pursuant thereto and relevant thereto.

A matter of such grave importance to every living resident in the United States, justly deserves the attention and the final opinion of this great Court of last resort.

It is, therefore, respectfully submitted that the petition should be granted.

T. Emmett McKenzie,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION

SUMMARY OF ARGUMENT

I

The assertion of the Court below, in its opinion, R. 12, that petitioner was within the confines of the District of Columbia, solely by reason of writ of habeas corpus ad prosequendum was erroneous, in that the cause under the authority of which, the writ of habeas corpus ad prosequendum had issued had terminated; and with the termination of the cause the process issued incidental to the prosecution thereof ceased to have legal existence.

II

The assertion of the Court below, in its opinion, R. 12, that presence in this judicial district, by reason of writ of habeas corpus ad prosequendum, operated to deprive the Courts of this jurisdiction of their power and duty to hear and determine, on the merits, writs of habeas corpus ad subjiciendum, is erroneous, for the writ of habeas corpus ad prosequendum is process merely. It exists for the purpose of bringing a named person from a prison to a named Court to undergo trial, and its force and effect is dissipated when the person named in the writ is delivered over to the Court issuing the same, and passes into the custody of that Court for the term of the trial.

III

The assertion of the Court below that one in this jurdiction may not have the benefit of the writ of habeas corpus ad subjiciendum, because he is here by reason of writ of habeas corpus ad prosequendum, suspends the privilege of the writ of habeas corpus ad subjiciendum, contrary to the terms of Article I, Section 9, Clause 2 of the Constitution of the United States.

IV

The assertion of the Court below that one in this jurisdiction may not have the benefit of the writ of habeas corpus ad subjiciendum, because he is here by reason of writ of habeas corpus ad prosequendum, is erroneous, in that it sets aside and holds for naught the terms and provisions of Title 28, Sections 451, and 452, United States Code.

ARGUMENT

Point I

The Assertion of the Court Below, R. 12, that Petitioner Was Within the District of Columbia, Solely by Reason of Writ of Habeas Corpus ad Prosequendum Is Erroneous.

Whether, or not, the gods were in capricious mood on May 28, and June 30, 1947, when they arranged for the legal perplexities incident to the "*Mass Sedition*" trial, and petitioner's appeal to come on for simultaneous hearing and decision before the Court below, mortal man cannot determine.

What he can determine however, is this: On May 28, 1947, the Court below heard the argument in this cause, and on the same day heard the argument on the appeal of the "*Mass Sedition*" case.

What he can further determine, is this: On June 30, 1947, the Court below delivered its written opinion in this case, and on the same day delivered its written opinion in the "*Mass Sedition*" case.

Ergo, the Court below had before it for judicial consideration, and judicially and factually knew, the record in each and both cases.

It therefore knew—judicially and factually—that William Dudley Pelley, petitioner here, had been brought to the Washington Asylum and Jail in November 1942, by virtue of writ of habeas corpus ad prosequendum, to defend himself in the "*Mass Sedition*" case.

It therefore knew—judicially and factually—that on December 2, 1946, the trial court dismissed the "*Mass Sedition*" case, and entered upon the record thereof—in writing as part of the record in the cause—the following:

> "• • • it is this 2nd day of December, 1946, ordered, That the said case be, and the same is, hereby dismissed.

> "* * * and thereupon it is considered by the Court that the defendants, William Dudley Pelley, * * * be released from further custody in this case. * * *."

Doubtless, the Court below, assumed, that since the government of the United States had appealed from the judgment set forth immediately above that the original proceedings continued in their original vigor and exact condition.

WHEREFORE, DOUBTLESS, THE COURT BELOW ASSUMED THAT WILLIAM DUDLEY PELLEY WAS BEING CONTINUOUSLY CONFINED IN THE WASHINGTON ASYLUM AND JAIL UNDER AUTHORITY OF THE WRIT OF HABEAS CORPUS AD PROSEQUENDUM.

But it must be assumed that the Court below knew that under Title 18, section 682, United States Code, was to be found the following:

> "Pending the prosecution and determination of the appeal in the aforegoing instances, the defendant *shall* be admitted to bail on his own recognizance; * * *."

It probably constitutes no slander upon the ability of homo sapiens, judicial branch, to believe that some judicial minds might have reasoned thus:

William Dudley Pelley came to the District of Columbia under writ of habeas corpus ad prosequendum.

The case in which that writ issued has been dismissed by the trial court.

Therefore the process in the case is at an end.

But the government has appealed.

Probably, therefore, everything remains suspended, pending final determination of the appeal; wherefore the writ of habeas corpus ad prosequendum remains in force

and effect, and consequently continues to confine William Dudley Pelley.

But the appeal is taken by the government, in a criminal case.

And the law is that when the government takes an appeal in a criminal case, the defendant *shall* be admitted to bail on his own recognizance.

Certainly William Dudley Pelley has not been so admitted to bail.

Certainly too, nothing in the appealed criminal case can continue to restrain him of his liberty.

What does operate to restrain him of his liberty?

His conviction of August 12, 1942 in Indianapolis, Indiana, and that solely.

But no such perplexity bedevilled the Court below.

It declared, succinctly, unanimously, and with great paucity of legal verbiage, that it had made a similar ruling in *Downey* v. *United States,* 67 App. D. C. 192, 94 F. 2d 223; and *Noble* v. *Botkin,* 80 U. S. App. D. C. 354, 153 F. 2d 228; and therefore the case of this petitioner must be also dismissed.

It is earnestly asserted that by reason of Title 18, Section 682, United States Code, William Dudley Pelley, has not been, and could not legally be, held in the District of Columbia jail, by virtue of the writ of ad prosequendum in the "*Mass Sedition*" case; and if this point is well taken, the reasoning of the Court below is fallacious and untenable.

Point II

The Writ of Habeas Corpus ad Prosequendum Is a Type or Form of Process, Merely, and Deprives a Court of Jurisdiction in All Other Matters, not the Least Whit.

In Black's Law Dictionary, we find this definition of Habeas corpus ad prosequendum:

> "A writ which issues when it is necessary to remove a prisoner in order to *prosecute* in the proper jurisdiction wherein the fact was committed." 3 Bl. Comm. 130.

In determining that the writ of habeas corpus ad prosequendum has the legal force and effect attributed to it by the Court below, in *Downey* v. *United States,* and *Noble* v. *Botkin, supra,* and in the instant case, the Court below must have been thinking in terms of *Barth* v. *Kline,* 12 Wall. 400, 402, 403, 20 L. Ed. 393, which states as follows:

> "By the common law, upon the return of a writ of habeas corpus and the production of the body of the *party suing it out,* the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safe-keeping of the prisoner is entirely under the control and direction of the court to which the return is made. Pending the hearing he may be bailed de die in diem, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court. He may be brought before the court from time to time by its order until it is determined whether he shall be discharged or absolutely remanded."

But these expressions of the Supreme Court should be read in the light of *Ex parte Bollman,* 4 Cranch, 75, 96, 97, 100, 101, 2 L. Ed. 554, as follows:

> "It has been truly said that this (meaning habeas corpus) is a generic term, and includes every species of that writ. To this it may be added, that when used

singly—when we say the *writ of habeas corpus,* without addition, we most generally mean that great writ which is now applied for; (habeas corpus ad subjiciendum) and in that sense it is used in the Constitution.

* * * *

"3d. Ad prosequendum, testificandum, deliberatum, &., 'Which issue when it is necessary to remove a prisoner to prosecute, or bear testimony, in a court, or to be tried in the proper jurisdiction wherein the fact was committed."

It will be noted the effects and results of habeas corpus described in *Barth* v. *Kline,* result, when and only when it is the species of writ which results in the production of the body of the *party suing it out.* This can describe, only, the writ habeas corpus ad subjiciendum.

And, *Ex parte Bollman,* expressly limits the qualifying and restricting results of the writ to the writ habeas corpus ad subjiciendum.

Counsel has been able to find no case decided by this Court which states, directly or by implication, that the writ habeas corpus ad prosequendum, carries with it the results and restrictions found therein by the Court below.

If the writ habeas corpus ad prosequendum be, then, but a form of process, to fit unusual cases, it has no more force and effect than any other judicial process; and may not destroy nor suspend Constitutional guarantees, nor set aside nor abridge the Statutes of the United States.

Point III

The Ruling of the Court Below Suspends, in Law and in Fact, the Constitutional Privilege of the Writ of Habeas Corpus.

Article I, Section 9, Clause 2, of the Constitution of the United States provides as follows:

> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Now this is plain and mandatory language.

It is an explicit guarantee of one of freemen's most precious safeguards of liberty.

It spells out, explicity and unequivocally, the only circumstances in which the great writ may be suspended under sanction of law.

But what is the effect of the ruling of the Court below?

It is that a man within the District of Columbia, who has been brought there by writ of habeas corpus ad prosequendum SHALL NOT HAVE THE PRIVILEGE OF HABEAS CORPUS.

And what does it mean in the instant case?

Since November 1942, petitioner has been confined in this local city jail;—a jail which admittedly has no facilities for handling long-term prisoners,—by reason of the issuance of a writ of habeas corpus ad prosequendum.

He has been powerless to leave.

From November 1944—when Chief Justice Eicher died—until November 1946, when Chief Justice Laws dismissed the case which brought him here, he was in the local city jail at the whim and caprice of the government of the United States. Whilst they, fearful of the calibre of their case, despatched investigators to Europe to discover, if possible, facts which would have made an indictment of 1944 a good indictment, your petitioner was compelled to remain here under said writ.

As the Record shows, R. 3a-4a, petitioner filed during the interim, petition for writ of coram nobis in the District Court in Indiana; Petition for Leave to file petition of Coram nobis with the Circuit Court of Appeals for the

Fifth Circuit; petition for writ of habeas corpus in the District Court in Indiana; and each and all were denied because he was within the District of Columbia under writ of habeas corpus ad prosequendum.

And when he filed his petition for writ of habeas corpus in Washington, D. C., it was denied because the Courts of that District declined to exercise jurisdiction.

That Court said: Pelley, you are not legally here.

True, you have lived here for almost five solid years without a day's departure.

Here you have been hospitalized and suffered a very serious medical operation. R. 3a.

But you are not here as a citizen of the United States.

You are not here as a human being—as a man—as a physical entity entitled to the full protection afforded all persons in the United States under the Constitution of the United States.

To us you are a vague, shadowy, ethereal being—without substance. We see you and know you are here—physically —but legally you are not here.

True you are not in Terre Haute, nor Indianapolis, nor elsewhere; but when it comes to invoking your Constitutional rights and guarantees you are not here—nor can you ever be here.

Our science is so utterly unable to cope with realities that jurisprudence is powerless to aid, or even recognize you.

Ergo, we condemn you to life imprisonment in the Washington City Jail before we can or will lift a finger to determine why, and how, and by what authority you remain in that common jail!

This, counsel contends, is carrying reductio ad absurdum to the point of subtle tyranny.

The Constitutional guarantee either means what it so plainly says; is either a living, breathing document filled with vigor and means of implementation; or it is a sad illusion; a will o' the wisp which can but guide free men to destruction.

And if it is true, that only in cases of rebellion or invasion, can the privilege of the writ of habeas corpus be suspended; then the Court below was legally powerless to say it cannot operate when a man is within a given jurisdiction under writ of habeas corpus ad prosequendum, and its opinion is a nullity and should be reversed.

Point IV

Title 28, Sections 451-461, United States Code, Dealing in Detail with the Matter of the Writ of Habas Corpus, Declare the Ruling of the Court Below to Be Erroneous.

On January 10, 1947, appellant filed with the United States District Court for the District of Columbia, his certain Petition for Writ of Habeas Corpus bearing number Habeas Corpus, 3155.

Thereafter the United States District Court for the District of Columbia dismissed his Petition for lack of jurisdiction; *holding,* That withal William Dudley Pelley was physically present within the District of Columbia, his presence was under Writ of Habeas Corpus Ad Prosequendum, wherefore this Court had perforce, to decline jurisdiction and refuse a hearing on the merits.

The absolute effect then of these judgments, in fact and in law, is THAT AS TO WILLIAM DUDLEY PELLEY, THE WRIT OF HABEAS CORPUS HAS BEEN SUSPENDED BY JUDICIAL ACTION.

There is but one question involved, to wit:

Can the United States District Court for the District of Columbia, issue out a Writ of Habeas Corpus Ad Prosequendum, directing the United States Marshal to seize, confine and keep confined, a citizen of the United States—indefinitely—within the jurisdiction of said Court; and then refuse to grant him a hearing on a Petition for Writ of Habeas Corpus, attacking his original conviction, upon the highly technical and strained construction that withal said Court through the power and authority of the United States Government, commands and continues to command his presence in this jurisdiction, it may deny him his Constitutional Right to a Writ of Habeas Corpus because, legally, he is here for the sole purpose of being a defendant in a cause pending before said Court?

CONSTITUTIONAL PROVISION INVOLVED

ARTICLE I, Section 9, Clause 2:

"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

STATUTE INVOLVED

UNITED STATES CODE, Title 28:

"Section 451. Power of Courts. The Supreme Court and the district courts shall have power to issue writs writs of habeas corpus.

"Section 452. Power of judges; place of entering writ of circuit judge.

"The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within the circuit, that a district judge has within his dis-

trict; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

"Section 453. When prisoner is in jail.

"The writ of habeas corpus shall in no case extend to a prisoner in jail unless he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; * * *

"Section 454. Application for; complaint in writing.

"Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

"Section 455. Allowance and direction.

"The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

"Section 456. Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days.

"Section 457. Form of Return.

"The person to whom the writ is directed shall certify to the Court, or justice, or judge before whom it is returnable the true cause of the detention of such party.

"Section 458. Body to be Produced.

"The person making the return shall at the same time bring the body of the party before the judge who granted the writ.

"Section 459. Day for Hearing.

"When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time.

"Section 460. Denial of Return; Counter Allegation; Amendments.

"The petitioner or the party imprisoned or restrained may deny any of the facts as set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

"Section 461. Summary hearing; disposition of party.

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

STATEMENT OF POINTS

Where, a citizen is imprisoned under or by color of the authority of the United States, and files a Petition for Writ of Habeas Corpus, which spells out a prima facie case, in any Court of the United States, he has the right, under the habeas corpus act, to a hearing upon the merits.

That right is to a hearing upon the merits, for the purpose of determining by judicial inquiry what is the very truth and substance of the causes of his detention.

The causes of his "commitment" in any given institution do not limit, define or restrict the scope, nature or purpose of that judicial inquiry.

The very truth and substance of the causes of his detention, under the color or authority of the United States, must be inquired into, else the statute is disregarded.

In the instant case the Court below did not require the writ to issue for the purpose of Answer or Denial and hearing upon the merits. The Court below required the respondent to show cause, if any he had, why the writ should not issue.

Thereupon counsel for respondent cited the trial Court the cases of *Downey* v. *United States,* 67 App. D. C., 192, 196, 91 F. 2d 223; and *Noble* v. *Botkin,* 80 U. S. App. D. C. 354, 153 F. 2d 228; and the Court below dismissed the Petition for Writ of Habeas Corpus, holding, that under those cases he could not entertain the cause upon the merits.

The *Downey* case turns upon a holding that the "commitment" is the thing subject to inquiry, and therefore wrong.

Section 451 of Title 28, United States Code, does not prescribe the cases in which the writ may issue; and section 452 says it shall issue to determine the cause of restraint of liberty.

In this cause the Court below invented a prescribed situation, and flatly declined to inquire into the cause of restraint of liberty.

Downey v. *United States, supra,* as will be more fully shown, infra, relies upon the commitment phase of the

habeas corpus development, and is in direct conflict with *King* v. *McLean Asylum Of The Massachusetts General Hospital*, 64 Fed. 331, 341, 342, 343, 344, 345, 346, 347.

Counsel for petitioner is loath to cite the Court so lengthy opinion—for certainly brevity is highly desirable where permissible; but this case so thoroughly deals with the matter as to convince counsel it would be unfair to deal with it lightly. There the Court spoke as follows—and it may be said in passing, we have found no case overruling these principles:

> "There probably was no topic which went into the Constitution of the United States, or into the early constitutions of the various states, about which the framers were more anxious that that of the right to the great writ of habeas corpus ad subjiciendum. The provision of the federal constitution that 'the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it' (article I, sec. 9), is one to which congress cannot give complete effect except through the federal tribunals. *For congress to have refused or omitted to vest the power to issue this writ would have been a suspension of the writ in advance;* and, so far as it might refuse or omit to vest it to the full extent of its constitutional authority to do so, it would be the equivalent of such suspension pro tanto. In *Ex parte Bollman*, 4 Cranch, 75, Chief Justice Marshall, referring to this constitutional injunction, said, on page 95:
>
> "'Acting under the immediate influence of this injunction, they, (the congress) must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity, *for if the means be not in existence the privilege itself would be lost, although no law for its suspension should be enacted.*'
>
> "Also, in *Ex parte Yerger*, 8 Wall. 85, the court said, on page 95:
>
> "'In England, all the higher courts were open to applicants for the writ (meaning the writ of habeas

corpus) *and it is hardly supposable that under the new government (meaning the United States),* founded on more liberal ideas and principles, *any court would be intentionally closed to them.'*

"Again it said (page 96):

" '*It would have been indeed a remarkable anomaly if this court ordained by the constitution for the exercise in the United States of the most important powers in civil cases* of all the highest courts of England, *had been denied, under a constitution which absolutely forbids a suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint which the habeas corpus act of Charles II., expressly declares those courts to possess.'*

"The presumption therefore stands that congress would intend to vest in its judicial tribunals, and, if necessary, part in one and part in the others, the entire jurisdiction permissible under the constitution, so far as it appertains to this writ. It follows that all general expressions touching all that part of the constitutional jurisdiction relative to this writ which could not be vested in the supreme court are to be construed subject to the presumption that it was intended by congress to be vested in some other judicial tribunal. On this point, Chief Justice Marshall, in *Ex parte Bollman,* said further, on page 96:

" '*Whatsoever motives might induce the legislature to withhold from the supreme court the power to award the great writ of habeas corpus, there could be none which would induce them to withhold it from every court in the United States.'*

"In accordance with this presumption, the statute was framed as soon as possible after the organization of the new government; commonly known as the 'Judiciary Act,'—Sept. 24, 1789, c. 20 (1 Stat. 73),—containing the following, and which refers to the supreme court, the circuit courts, and the district courts:

" 'Sec. 14. And be it further enacted that all the before mentioned courts of the United States, shall

have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an *inquiry into the cause of commitment.* Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.'

"Although it would seem that this provision of law should have had the broadest construction, in view of the presumption to which we have already referred, it was always regarded as possessing some obscurity. *Ex parte Burford,* 3 Cranch, 448, 449. First, it was denied that the writs of habeas corpus specified were the great writs of ad subjiciendum; second, it was claimed that, like the writs not enumerated, they could be made use of only as incidental to jurisdiction acquired in a pending cause; and, third, *that the word "commitment" used in section 14, in direct connection with the power vested in justices and judges, referred back to and controlled the powers vested in the courts themselves, and, moreover, had a narrow, technical meaning, to such an extent as to prohibit the writ except in behalf of persons in custody on criminal or civil process.* * * * It would seem that *Ex parte Bollman,* should have been understood as sweeping away the more substantial of these doubts. Certainly, that case held that the writs specified in the statute included the writ ad subjiciendum. It ought also to have been understood as disposing of the proposition that the power to issue the great writ was limited to such as were necessary to enable the courts to exercise their respective jurisdiction in pending causes; in this respect distinguishing from writs of mandamus, and other writs not specified in the section cited. *Rosenbaum* v. *Bauer,* 120 U. S. 450,

7 Sup. Ct. 633. *Ex parte Wilson*, 6 Cranch 52, has been cited and relied on as establishing, to its full length, the proposition that this writ could not issue under the judiciary act unless there was a commitment on a criminal process, although Chief Justice Marshall, who spoke for the court in that case, afterwards, in 1833, in *Ex parte Randolph*, 2 Brock. 447, Fed. Cas. No. 11,558, sitting in the circuit court, united in the discharging of the petitioner from custody under a treasury warrant. The effect of the opinion of the chief justice in *Ex parte Bollman* was clearly understood by Mr. Justice Story to sweep away all these doubts, because, in the first edition of his Commentaries on the Constitution, published in 1833, he said, in section 1335, "Congress have vested in the Courts of the United States full authority to issue this great writ in cases falling properly within the jurisdiction of the national government." In subsequent editions of this work this expression was repeated in the same terms. Yet some of the doubts and refinements to which we have referred were subsequently persisted in, and are found in authors of such respectability as Hurd on Habeas Corpus, at various points. Judge Betts, in *Re Barry*, 136 U. S. 613, 42 Fed. 13, although conceding that *Ex parte Randolph* decided that the writ lies to inquire into the cause of commitment, if made on a civil process, still insists on his doubt touching this proposition. Under these circumstances it becomes necessary to consider the effect of the rearrangements in the Revised Statutes of the provisions of the judiciary act touching writs of habeas corpus, and the purging which they there received of some of the expressions referred to, on which these doubts have been built up.

"It will be noticed, first of all, that in the revision the enactment touching the writ of habeas corpus was dislocated from that touching all others, and from that touching the powers of justices and judges, so that we find an entire section as follows:

" 'Sec. 751. The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus.'

"So much of the judiciary act as related to the issue of other writs appears in section 716, and the supposed limitation arising out of the word "commitment" in section 752. Thus, whatever doubt could be raised by the grouping in the act of 1789 disappears, unless we are compelled to hold that the ordinary rule applies to this case,—that the Revised Statutes did not intend to change the law.

"*Another marked departure is found in the next provision of the Revised Statutes as follows:*

" 'Sec. 752. The several justices and judges of the said courts within their respective jurisdictions shall have power to grant *writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.*'

"*In this the word "commitment", so much relied on as restricting the effect of the original statute, disappears, and the words 'restraint of liberty' take its place,—a change of a marked character.*

"Touching upon what is now section 751 of the Revised Statutes, the report of the commissioners (the body appointed to revise the statutes), which will be found in the edition of 1872, under title 13, commencing on page 133, is very full; and its effect is of a decided character, and works out a clear result. *These words should perhaps be qualified to some degree as to the use of the words 'cause of restraint of liberty', appearing in section 752, in lieu of the original words of the judiciary act, 'cause of commitment.'* We will therefore interpose at this point to say as to these expressions, that *certainly the changed phraseology will allow writs of habeas corpus to stand, and that at common law they do stand, for all unlawful restraints, whether under color of process, or through the illegal acts of individuals, or* under such commitments as are found in the case at bar.
* * *

"To return to the commissioner's report, among other things it is to be noted that it refers to the expressions in *Ex parte Yerger*, 8 Wall. 85, appearing in page 101, as follows:

"'*The great and leading intent of the constitution and the law must be kept constantly in view upon the examination of every question of construction. That intent,* in respect to the writ of habeas corpus, is manifest. It *is that every citizen may be protected by judicial action from unlawful imprisonment.* To this end *the act of 1789 provided that every court of the United States should have power to issue the writ.* The jurisdiction thus given in law to the circuit and district courts is original. That given by the Constitution and the law to this court is appellate. *Given in general terms, it must necessarily extend to all cases to which the judicial power of the United States extends, other than those expressly excepted from it.*'

"The commissioners cite the last clause of this citation. Then they use this language:

"'Now, the constitution declares that "the judicial power shall extend", not only "to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority", but to controversies "between a state or the citizens thereof, and foreign * * * citizens or subjects."'"

How stands *Downey* v. *United States,* in the light of this opinion?

At page 196 of 67 App. D. C., 94 F. 2d 223, the Court uses the following language:

(1-5) "* * * the writ (was) properly discharged. * * * the marshal was holding the appellant not under the commitment issued pursuant to the sentences, but under the writ of habeas corpus ad prosequendum, (and this was) a valid defense to the appellant's own writ.

This language means that where a petition for writ of habeas corpus is filed under such circumstances, this Court will refuse to inquire into the causes of restraint of liberty

and look only to the commitment under which the marshal holds the petitioner.

Noble v. *Botkin,* at page 354 of 80 U. S. App. D. C., 153 F. 2d 228, says this:

> "(2) Further, we are in accord with the conclusion of law reached by the District Court in the instant case, holding that petitioner could not have alleged errors in the California trial examined here, where he is held solely by reason of the writ of habeas corpus ad prosequendum."

That the *Downey* and *Noble* cases affirm a limitation upon the right to petition for writ of habeas corpus cannot be doubted. Ergo, it is proper to inquire into the source and authority supporting this alleged limitation and restriction.

In *Ex parte Watkins,* 3 Pet. 193, 201, 7 L. Ed. 653, Chief Justice Marshall says:

> "* * * no law of the United States prescribes the cases in which this great writ shall be issued."

Certainly the limitation established by the Court below was unknown to Chief Justice Marshall as being part of any law of the United States in his time.

Equally certain it is that it is not to be found in those sections of Title 28 of the United States Code which comprise the Habeas Corpus Act.

It is not in the District Code as far as we can ascertain.

So that appellant is forced to conclude that the Court below, in limiting its scrutiny to a "commitment", fails to see the "cause for restraint of liberty", as the true guide star in the matter.

True this error has been frequently made heretofore and by high authority—but it should not persist after the amendment to the habeas corpus act.

This phase of habeas corpus law has been before the Supreme Court of the United States, and in *Walker* v. *Johnston,* 312 U. S. 275, 285, 286, 61 S. Ct. 574, 89 L. Ed. 830, we find this language:

> "* * * if an issue of fact is presented the practice appears to have been to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received. This is, we think, the only admissible procedure. Nothing less will satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.' It is not a question of what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which R. S. 761 is derived was adopted by Congress. The question is what the statute requires.
>
> "As we said in *Johnson* v. *Zerbst,* 304 U. S. 458, 466, 'Congress has expanded the rights of a petitioner for habeas corpus. * * * "There being no doubt of the authority of the Congress to thus liberalize the common law procedure on habeas corpus * * * it results that under the sections cited a prisoner in custody * * * may have a judicial inquiry into the very truth and substance of the causes of his detention." * * *' Such a judicial inquiry involves the reception of testimony as the language of the statute shows."

Here, from the facts stated under oath in the petition for writ of habeas corpus it becomes immediately evident that petitioner is not seeking relief from the commitment which keeps him in the District Jail rather than in that at Terre Haute, Indiana.

From the petition it is obvious that any inquiry "into the very truth and substance of the causes of his detention" will necessarily embrace an inquiry into the legality of his Indiana conviction.

Animadverting to *Johnson* v. *Zerbst,* 304 U. S. 458, 467, 58 S. Ct. 1019, 82 L. Ed. 1461, we find this:

"'* * * it is open to the course of the United States to look beyond forms and inquire into the very substance of the matter, * * *.'" (citing *Frank* v. *Mangum*, 237 U. S. 309, 331)."

And in *Hawk* v. *Olson*, 90 L. Ed. 67, 69, 70, 326 U. S. 271, 61 S. Ct. 116, this rule is stated:

"Since *Frank* v. *Mangum*, 237 U. S. 309, 331, 59 L. Ed. 969, 981, 35 S. Ct. 582, *this Court has recognized that habeas corpus in the Federal Courts by one convicted of a criminal offense is a proper procedure 'to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution'*, even though the events which were alleged to infringe did not appear upon the face of the record of his conviction. This opportunity for an examination into the 'very truth and substance of the causes of his detention' was said in the *Frank* case to have come from the adoption in 1867 (February 5) of a statute which empowered Federal Courts to examine into restraints of liberty in violation of the Constitution of the United States. 14 Stat. 385, c 28. *The legislation enlarged for the Federal courts the 'bare legal review' of the authority under which a petitioner was held which had been previously afforded by habeas corpus. Johnson* v. *Zerbst*, 304 U. S. 458, 465-467, 82 L. Ed. 1461, 1467, 1468, 58 S. Ct. 1019, 146 ALR 357. See also *Re Neagle (Cunningham* v. *Neagle)* 135 U. S. 1, 69-76, 34 L. Ed. 55, 73-76, 10 S. Ct. 658; *McNally* v. *Hill*, 293 U. S. 131, 79 L. Ed. 238, 55 S. Ct. 24."

Can it be successfully asserted that under the rule set forth in the *Downey* and *Noble* cases there is anything more than the bare minimal legal review the statute sought to change?

Under the Downey and Noble rule Courts in this jurisdiction look to form only and substance is held for naught.

In *Ex parte Endo*, 89 L. Ed. 219, 232, 233, 323 U. S. 283, 65 S. Ct. 238, the Court says:

"* * * we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner. As Judge Cooley stated in *Re Jackson,* 15 Mich. 417, 439, 440:

" 'The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent.'

"* * * The statute upon which the jurisdiction of the District Court in habeas corpus proceedings rests (Rev Stat sec. 752 28 USCA sec. 452 8 FCA title 28, sec. 452) gives it power 'to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.' That objective may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court. That end may be served and the decree of the court made effective if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was brought."

Here, both petitioner and respondent are within the jurisdiction of our Courts.

The petitioner is here, it is true, under writ of habeas corpus ad prosequendum—but what magic is there in the words writ of habeas corpus ad prosequendum which avail to hold at bay the power of the Courts of the United States?

From what dark and obscure sources comes the necromancy of that phrase?

CONCLUSION

The situation presented herein seems to have been of infrequent character during the greater part of our judicial history; but with the growing participation by the federal government in criminal matters, it has manifested a more frequent tendency to require solution.

Certainly it is no exaggeration to state that the matter of whether the right of the citizen to the privilege of the writ of habeas corpus can be abridged or suspended by judicial decree, unsupported by statutory or Constitutional authority, is one of paramount importance to justice under the law.

Further it is of such vast importance that it deserves a clear and unequivocal judicial guide-post to be promulgated and enunciated by our highest judicial tribunal, to the end that the various subordinate federal courts may not be left in doubt as to the correct legel method of procedure in such cases.

The citizen is entitled to know, upon the highest authority, the extent and vigor of this great Constitutional privilege.

Wherefore, it is respectfully submitted, the writ should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 350

WILLIAM DUDLEY PELLEY, PETITIONER

v.

W. BRUCE MATTHEWS, UNITED STATES MARSHAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 12) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 30, 1947 (R. 13). The petition for a writ of certiorari was filed September 16, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the district court for the district in which a prisoner is temporarily in custody, primarily by virtue of a writ of habeas corpus ad prosequendum, may properly decline to entertain a petition for a writ of habeas corpus ad subjiciendum attacking the validity of the judgment under which the prisoner was originally committed.

STATEMENT

On August 12, 1942, petitioner was convicted of sedition in the United States District Court for the Southern District of Indiana, and he was sentenced to imprisonment for 15 years (R. 2). His conviction was affirmed on appeal, 132 F. 2d 170 (C. C. A. 7), and a petition for a writ of certiorari was denied by this Court, 318 U. S. 764.

Petitioner commenced service of his sentence on August 15, 1942, in the United States penitentiary at Terre Haute, Indiana (R. 2). In November 1942, he was brought to the District of Columbia pursuant to a writ of habeas corpus ad prosequendum to be tried on an indictment charging him and others with conspiracy to engage in subversive activities (R. 3, 9). That indictment was dismissed on December 2, 1946, and the Government took an appeal from the order of dismissal (R. 9). See *United States* v. *McWilliams,* No. 9438 (App. D. C.), decided June 30, 1947.

In January 1947, while that appeal was pending, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia, attacking the validity of his conviction in the district court in Indiana on the grounds that women were systematically excluded from the panels of grand and petit jurors in that court, that the indictment on which he was convicted charged no offense, that the evidence failed to establish an offense, that the trial court was hostile to petitioner, and that the court improperly charged the jury and permitted the United States Attorney to make an inflammatory argument (R. 2–7).

An order to show cause issued (R. 8), and respondent filed a response in which he contested the jurisdiction of the district court for the District of Columbia to consider the petition on the ground that petitioner was being held in that district under the writ of habeas corpus ad prosequendum (R. 8–9). The district court thereafter discharged the rule to show cause and dismissed the petition (R. 10). On appeal, the order of the district court was affirmed (R. 13), the Court of Appeals adhering to its earlier ruling in *Noble* v. *Botkin,* 153 F. 2d 228, certiorari denied, 325 U. S. 888, that the district court has no jurisdiction to entertain a petition for a writ of habeas corpus attacking the petitioner's original conviction while the petitioner is held in the juris-

diction solely by reason of a writ of habeas corpus ad prosequendum (R. 12). On the same day the Court of Appeals affirmed the order of the district court dismissing the indictment in the District of Columbia sedition case. *United States* v. *McWilliams, supra.*

ARGUMENT

1. Since proceedings in the sedition prosecution, for which petitioner was brought to the District of Columbia, have been concluded, the cause of his detention in that district no longer exists. Were it not for the pendency of the instant petition for a writ of certiorari, petitioner would by now have been returned to the penitentiary designated as the place for service of his sentence. Under the circumstances, therefore, there is no reason why his petition for a writ of habeas corpus attacking his conviction in Indiana should be heard in the courts of the District of Columbia.

As we pointed out in our brief for the respondent in opposition in *Noble* v. *Botkin,* No. 1288, O. T. 1944, the district court for the district in which a defendant is temporarily in custody, primarily by virtue of a writ of habeas corpus ad prosequendum, may properly decline to consider a writ ad subjiciendum when the application for the writ may more appropriately be made in the district designated as the place of confinement under the original judgment. See *Sanders* v. *Brady,* 57 F.

Supp. 87 (D. Md.). Such a policy is no more a limitation on the writ of habeas corpus than is the policy of federal courts not to entertain a petition attacking a state conviction until state remedies have been exhausted,[1] or the policy of federal appellate judges to decline to act on petitions which may with equal facility be presented to a district court.[2] The habeas corpus statute (28 U. S. C. 452, ff) does not "deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it." *Ex parte Royall*, 117 U. S. 241, 251.

It is unnecessary here to consider whether, under special circumstances, such as prolonged prospective presence in the district to which the petitioner has been removed for trial, there may be valid reasons for departing from such policy. Whatever may have been the situation before the sedition case in the District of Columbia was concluded, no such special circumstances now exist. Only the pendency of his instant petition for certiorari prevents petitioner from seeking relief in the district designated as the place for service of his sentence.

2. Independently of the foregoing considerations, the order of the district court dismissing

[1] *Ex parte Hawk*, 321 U. S. 114, 117.

[2] *United States* v. *Hill*, 71 F. 2d 159 (C. C. A. 3); *Sweetney* v. *Johnston*, 121 F. 2d 445 (C. C. A. 9), certiorari denied, 314 U. S. 607.

the petition for a writ of habeas corpus may be sustained on the ground that petitioner presented no issues cognizable on habeas corpus. His petition in part merely reiterates contentions which were resolved against him on his direct appeal from his conviction, and in part alleges other trial errors which are not subject to review on habeas corpus. See *Sunal* v. *Large,* No. 535, O. T. 1946, decided June 23, 1947.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

Supreme Court of the United States

October Term, 1947

No. 350

WILLIAM DUDLEY PELLEY,
Petitioner,

v.

W. BRUCE MATTHEWS, UNITED STATES MARSHAL,
Respondent.

PETITION FOR REHEARING

We rely, for the purpose of this petition, upon the case of *Sunal v. Large*, 91 L. Ed. 1561, 1562, 1563—being cases numbered 535 and 840, combined, and decided by this Court June 23, 1947.

This language of the Court appears to make our case.

> "The First Judiciary Act empowered the courts of the United States to issue writs of habeas corpus. Section 14 of the Act of September 24, 1789, 1 Stat. 73, 81, c. 20. Since the scope of the writ was not defined by Congress, it carried its common law implications. The writ was greatly enlarged after the Civil War by the Act of February 5, 1867. 14 Stat. 385, c. 27. (For legislation dealing with habeas corpus see note in 18 F. 68.) It was no longer limited to searching the face of a judgment of a court of competent jurisdiction. It was available to cut through forms and go

'to the very tissue of the structure,' Mr. Justice Holmes in Frank v. Mangum, 237 U. S. 309, 345, 346, 59 L. ed. 969, 986, 987, 35 S. Ct. 582, though it was certainly not to be invoked merely as a substitute for an available appeal. But what is 'form' and what is the 'tissue of the structure,' and when is a writ sought in fact as a substitute for an appeal in a practical view of the administration of justice, are questions to which our decisions give dubious and confused answers. I think it is fair to say that the scope of habeas corpus in the federal courts is an untidy area of our law that calls for much more systematic consideration than it has thus far received.

"The extent to which this Court has left itself unhampered, by not drawing sharp jurisdictional lines, is indicated by the following very tentative classification of categories in which habeas corpus has not been deemed beyond the power of federal courts to entertain:

"(1) Conviction by a federal court which had no jurisdiction either over the person or of the offense. See Ex parte Watkins, 3 Pet. (U. S.) 193, 203, 7 L. ed. 650, 653; Ex parte Parks, 93 U. S. 18, 23, 23 L. ed. 787, 788. But the writ is discretionary and may not issue even though if an opportunity were allowed such want of jurisdiction might be established. See Toy Toy v. Hopkins, 212 U. S. 542, 53 L. ed. 644, 29 S. Ct. 416, and Rodman v. Pothier, 264 U. S. 399, 68 L. ed. 759, 44 S. Ct. 360. And compare Re Mayfield, 141 U. S. 107, 35 L. ed. 635, 11 S. Ct. 939, with Re Blackbird (C. C.) 66 F. 541.

"(2) Conviction under unconstitutional statute. Ex parte Virginia 100 U. S. 339, 343, 25 L. ed. 676, 678; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Ex parte Curtis, 106 U. S. 371, 27 L. ed. 232, 1 S. Ct. 381; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 S. Ct. 152. The writ was denied in each case, but the Court passed on the constitutionality of the statute. Here to the availability of the writ will depend on the circumstances of the case, particularly the stage in the criminal proceedings at which the writ is sought. Johnson v. Hoy, 227 U. S. 245, 57 L. ed. 497, 33 S. Ct.

240; Henry v. Henkel, 235 U. S. 219, 59 L. ed. 203, 35 S. Ct. 54. Compare Glasgow v. Moyer, 225 U. S. 420, 56 L. ed. 1147, 32 S. Ct. 753, with Re Gregory, 219 U. S. 210, 55 L. ed. 184, 31 S. Ct. 143. See also Re Lincoln, 202 U. S. 178, 50 L. ed. 984, 26 S. Ct. 602.

"(3) Violation by federal courts of specific constitutional rights: (a) double jeopardy. Compare Ex parte Bigelow, 113 U. S. 328, 28 L. ed. 1005, 5 S. Ct. 542, with Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 S. Ct. 556, and Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 S. Ct. 672; (b) self-crimination. Writ granted as to a witness held in contempt, though apparently not as to a defendant restrained on charge of crime. Compare Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 12 S. Ct. 195, 3 Inters. Com. 816, and Ex parte Irvine (C. C.) 74 F. 954 (Taft, Circuit Judge), with Re Moran, 203 U. S. 96, 51 L. ed. 105, 27 S. Ct. 25; (c) no indictment by grand jury. Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 S. Ct. 935. Also Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 S. Ct. 781. As to denial of constitutional rights in State courts, Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543, 43 S. Ct. 265.

"(4) Due regard for harmonious Nation-State relations, need to avoid friction and maintain balance. See Ex parte Rowland, 104 U. S. 604, 26 L. ed. 861; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 S. Ct. 164; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 S. Ct. 482; Bowen v. Johnston, 306 U. S. 19, 83 L. ed. 455, 59 S. Ct. 442. Compare Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 S. Ct. 785; Re Swan, 150 U. S. 637, 37 L. ed. 1207, 14 S. Ct. 225; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L. R. A. N. S. 932, 14 Ann. Cas. 764. Availability of other remedies is here an important factor. Similarly as to State interference with federal officers, prompt relief may be deemed necessary. Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 S. Ct. 453. See also Re Neagle (Cunningham v. Neagle), 135 U. S. 1, 34 L. ed. 55, 10 S. Ct. 658; Hunter v. Wood, 209 U. S. 205, 52 L. ed. 747, 28 S. Ct. 472.

"(5) Insufficiency of indictments is not open on habeas corpus; it may be in removal cases, in view

of the hardship to the individual and the inadequacy of other remedies. Compare Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 S. Ct. 430; also Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 S. Ct. 760. Compare also the extradition cases. Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 S. Ct. 1240; Ornelas v. Ruiz, 161 U. S. 502, 40 L. ed. 787; 16 S. Ct. 689; Bryant v. United States, 167 U. S. 104, 42 L. ed. 94, 17 S. Ct. 744.

"(6) Defects in jury panel, in trial procedure, exclusion or insufficiency of evidence, are rarely held ground for relief on habeas corpus. But when no other remedy was available and the error appeared flagrant, there have been instances of relief. See Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 S. Ct. 430. Compare Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 S. Ct. 781.

"(7) Legality of sentence or conditions of confinement. Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872; Re Bonner, 151 U. S. 242, 38 L. ed. 149, 14 S. Ct. 323.

"(8) Contempt cases. Ex parte Hudgings, 249 U. S. 378, 384, 63 L. ed. 656, 39 S. Ct. 337, 11 A. L. R. 333. Compare, Re Savin, 131 U. S. 267, 33 L. ed. 150, 9 S. Ct. 699, and Re Cuddy, 131 U. S. 280, 33 L. ed. 154, 9 S. Ct. 703. But when appeal is sufficient remedy, see Craig v. Hecht, 263 U. S. 255, 68 L. ed. 293, 44 S. Ct. 103, and Judge Learned Hand's dissenting opinion in the Craig case (C. C. A. 2d) 282 F. 138, 155.

"Perhaps it is well that a writ the historic purpose of which is to furnish 'a swift and imperative remedy in all cases of illegal restraint,' see Lord Birkenhead, Ld. Ch., Secretary of State v. O'Brien [1923] A. C. (Eng.) 603, 609—H. L., should be left fluid and free from the definiteness appropriate to ordinary jurisdictional doctrines. But if we are to leave the law pertaining to habeas corpus in the unsystematized condition in which we find it, then I believe it is true of both cases what Judge Learned Hand said of the Kulick Case, that the writ is necessary 'to prevent a complete miscarriage of justice.' 157 F. 2d 811, 813. If

the justification need be no more definite than the existence of 'exceptional circumstances,' Bowen v. Johnston, 306 U. S. 19, 27, 83 L. ed. 455, 461, 59 S. Ct. 442, the reasons for allowing the writs in these cases are more compelling than were those in Bowen v. Johnston, where there merely appeared 'to be uncertainty and confusion . . . whether offenses within the . . . National Park are triable in the state or federal courts.' For the reasons set forth in Judge Hand's opinion, it 'would pass all fair demands upon Kulick's diligence to conclude him because of his failure to appeal.' 157 F. 2d at 813."

I, T. Emmett McKenzie, counsel for petitioner, do hereby certify that this petition is not filed for purposes of delay, and is filed in good faith.

After careful consideration I am entirely unable to clearly understand why the original petition was not granted, under the Court's ruling in *Sunal v. Large*, *supra*.

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